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SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947

Nos. ~~65-551~~

COMMISSIONER OF INTERNAL REVENUE.

*Petitioner,*

vs.

LEWIS F. JACOBSON,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

LEWIS F. JACOBSON,

Respondent-Taxpayer,

*Pro Se,*

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**COMMISSIONER OF INTERNAL REVENUE.**

*Petitioner,*

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*Respondent.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
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SEVENTH CIRCUIT.

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**BRIEF FOR THE RESPONDENT IN OPPOSITION.**

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**STATEMENT OF CASE.**

The following additional facts should be considered in  
connection with petitioner's statement of the case (P. Br.  
3-7):

(a) The total amount of taxes involved in the issue presented by the Petition for Certiorari is \$580.76 for the year 1938, \$255.89 for the year 1939, and \$1,603.23 for the year 1940.\*

(b) The court below accepted the Tax Court's finding that the taxpayer was solvent during the years in question, but found that a perusal of the record made it quite apparent that he was in straitened financial circumstances. (R. 167)

(c) With respect to the method of making the purchase of bonds, the court below summarized the findings of the Tax Court and the evidence in the record concerning which the Tax Court made no contrary finding (R. 168-169). The sole issue involved, which was recognized by both the Tax Court and the court below, was whether the rule of this Court as announced in *United States v. Kirby Lumber Company*, 284 U.S. 1 (1931) or the rule announced in *Helvering v. American Dental Company*, 318 U.S. 322 (1943) applies to the facts in this case. (R. 128, 169)

The Tax Court and the court below agreed as to the proper rule with respect to certain of the transactions but differed as to the proper rule with respect to what the court below termed "nebulous" changes in the facts. (R. 172)

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\*These figures emerge from a computation of the tax resulting from the income sought to be included by the Commissioner as a result of the purchases of these bonds. There were other issues not here involved which affected the deficiency found to be due by the Tax Court. (R. 154)

## ARGUMENT.

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1. (P. Br. 7-8) A thorough analysis of the decisions of the Tax Court and the Circuit Court of Appeals for the Seventh Circuit in this case clearly indicates that there was no confusion as to the proper interpretation of the two decisions of this Court, *United States v. Kirby Lumber Company, supra*, and *Helvering v. American Dental Company, supra*. The only point of difference between the Tax Court and the Circuit Court of Appeals was whether the facts of this particular case came within the rule of the *Kirby Lumber Company* case or the *American Dental Company* case. The real issue was primarily a factual one and was not whether the *American Dental Company* case overruled or limited the holding in the *Kirby Lumber Company* case. Both courts recognized the rules announced in these two cases and differed only on the question as to which rule should be applied to this particular factual situation.

2. (P. Br. 9-11) There is no conflict between the decision in this case and that of the Circuit Court of Appeals for the Sixth Circuit in *Central Paper Company v. Commissioner*, 158 F. (2d) 131 and the decision of the Circuit Court of Appeals for the Second Circuit in *Fifth Ave. Fourteenth Street Corp. v. Commissioner*, 147 F. (2d) 453. These two latter cases involved a taxpayer purchasing either trustee certificates or mortgage certificates on the open market. In such a situation both courts correctly applied the rule of the *Kirby Lumber Company* case.

The court below in this case recognized and stated that if the bonds had been purchased on the open market by the taxpayer, the *Kirby Lumber Company* case would have applied. It held in effect that there can be no gratuitous



cancellation of indebtedness within the meaning of the *American Dental Company* case where open market purchases are involved because the creditor has no idea that he is gratuitously cancelling a part of his claims against his debtor. The Court pointed out that in this case there were no open market purchases.

Actually the decision in this case is not only in all respects consistent with, but, in effect, reaffirms the holding in these two cases that where a corporation purchases at a discount its bonds on the open market, the rule of the *Kirby Lumber Company* case applies. These two cases were cited in the brief of the Commissioner in the court below and were thus included in the opinion of the court as among the cases having no bearing upon a state of facts such as is presented in this case. (R. 171)

The other two cases cited by petitioner, *Shellabarger Grain Products Co. v. Commissioner*, 146 F. (2d) 177 (C.C.A. 7th) and *A. M. Campbell Realty Co. v. United States*, 69 F. Supp. 133 (Ct. Cl. 1947) clearly affirm and are consistent with the holding of the court below in this case.

3. (P. Br. 11-12) The decision in this case is not wrong. We wish to point out that the only similarity between the facts of this case and the *Kirby Lumber Company* case is that the indebtedness in both cases was evidenced by bonds. In all other material respects, the facts were entirely different. The only difference between the facts of this case and those in the *American Dental Company* case is that the indebtedness in this case was evidenced by bonds, while in the *American Dental Company* case, it was evidenced by an open account and interest on notes. Obviously the form of the indebtedness, whether bonds, notes, or open account has no bearing on whether its cancellation was gratuitous.

Every court which has been presented with a factual

situation, similar to that in this case has held the same as the court below. See *Bulkley Building Company v. Commissioner*, T.C. (M) No. 109679, CCH, Dec. 14206 (M); *Shellabarger Grain Products Co. v. Commissioner*, 146 F. (2d) 2177 (C.C.A. 7th); *A. M. Campan Realty Company v. United States*, 69 F. Supp. 133 (Ct. Cl. 1947).\*

4. (P. Br. 12-14) The petitioner takes the position that the fact that the bondholders attempted to get as high a price as possible from the taxpayer for the cancellation of their bonds negatives the idea that their cancellation of the balance due on the bonds was gratuitous. Undoubtedly in the *American Dental Company* case the creditor attempted to get as much money as possible from the taxpayer, the American Dental Company. This obviously has no bearing upon whether the cancellation of the indebtedness was gratuitous or not. This Court stated in the *American Dental Company* case:

"The fact that the motives leading to the cancellations were those of business or even selfish, if it be true, is not significant." (p. 331)

5. (P. Br. 14) The case is not of general importance. It is respectfully submitted that an intelligent application of the principles already enunciated by this Court can resolve all cases pending. Neither is there any reasonable assurance that a decision by this Court in this case will materially aid in the determination of the other cases with different factual situations. This Court recognized in the *American Dental Company* case (p. 327) that the issue

\**Edmont Hotel Company v. Commissioner*, 10 T.C. No. 31 (1948), cites the decision of the court below with approval as to one branch of the case, but held there must be some personal acquaintance between the creditor and the debtor in order to come within the ruling in the *American Dental Company* case. This distinction has no substance.

was a narrow one and thus dependent upon slight variations in the facts. Subsequent decisions of other courts reveal no conflict on principle but depend on particular facts in each case.

### CONCLUSION.

The decision below is correct. There is no conflict between the decision in this case and the decision of any other Circuit Court of Appeals in a similar case. The only question involved in this case is whether the facts of this case are similar to those of the *United States v. Kirby Lumber Company* case or those of the *American Dental Company* case. The amount involved in this case is only \$2,439.88. Clearly this is not the type of dispute which should be reviewed by this Court. The petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

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March 24, 1948.



